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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

HUSSEIN YOUSSEF and ZEINAB YOUSSEF,

Petitioners,

vs.

MORRISON ENTITY, et al.,

Respondents.

Petition for Writ of Certiorari To The Ninth Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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31PP

STATEMENT OF ISSUE PRESENTED

Whether value of the sale and conduct of the sale shall be factors in determining whether a purchaser bought an asset in good faith, and whether the bankruptcy court shall make an explicit finding of good faith for purposes of determining whether appellant comes within an exception to the application of 11 U.S.C. Section 363(m), which renders an appeal moot when an appellant fails to obtain a stay pending appeal.

PARTIES TO THE PROCEEDING BELOW

Petitioners	Hussein Youssef Zeinab Youssef
Petitioner's Counsel	E. James Higuchi Higuchi & Higuchi
Respondent	Morrison Entity
Respondent's Counsel	Randall A. Cohen England & Cohen
Respondent	Office of the United States Trustee
Respondent	Bank of America
Respondent's Counsel	Glen R. Segal Agapay, Levyn & Halling
Respondent	Cal Fed Savings
Respondent's Counsel	Cassandra J. Richey McKinley & Capeloto
Respondent	Lockheed Federal Credit Union
Respondent's Counsel	Edward G. Schloss

Respondent	Bankcard Services
Respondent's Counsel	Richard A. Salvatore Beckett & Watkins
Respondent	Steven Earl Smith, Trustee
District Court Judge	Hon. Arthur M. Greenwald
Ninth Circuit Bankruptcy Appellate Panel	Hon. Robert Clive Jones Hon. Alfred C. Hagan Hon. Sidney C. Volinn
Ninth Circuit Court of Appeals	Hon. David R. Thompson Hon. Thomas G. Nelson Hon. Andrew J. Kleinfield

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OPINION BELOW

The opinions of the Ninth Circuit Court of Appeals and Bankruptcy Appellate Panel are printed in the Appendix hereto.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, Section 1257(a) of the United States Code.

STATUTORY PROVISION INVOLVED

11 U.S.C. Section 363(m) of the Bankruptcy Code provides that,

> "The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal."

STATEMENT OF CASE

This is an appeal from an order, entered on October 27, 1997, of the Ninth Circuit Court of Appeals affirming the dismissal by the Bankruptcy

Appellate Panel of the Ninth Circuit, entered on March 18, 1997, of petitioners' appeal from an order converting the petitioners' case to a Chapter 7, and granting relief from the automatic stay, as moot, as no stay pending appeal was obtained, and subsequent events prevent them from fashioning effective relief.

The Ninth circuit Court of Appeals found the appeal to be moot on the grounds that petitioners failed to obtain a stay pending appeal, and because California law does not otherwise permit the transaction to be set aside.

On August 29, 1995, petitioners filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court, Central District of California.

On November 21, 1995, petitioners filed their first disclosure statement and plan. Hearing thereon was scheduled for December 27, 1995, at 9:00 A.M., in Courtroom 1475, before the Honorable Arthur M. Greenwald, Bankruptcy judge.

On November 29, 1995, petitioners filed an amended disclosure statement and plan in order to attach the appraisals of petitioners' three properties thereto.

On December 21, 1995, petitioners filed their supplement to the amended disclosure statement and plan.

On December 27, 1995, the hearing to consider the approval of the amended disclosure statement was ordered continued to January 31, 1996, at 3:00 P.M., in Courtroom 1475, and petitioners were ordered to file a further amended disclosure statement by January 10, 1996.

On January 9, 1996, petitioners filed their second amended disclosure statement and plan.

On January 16, 1996, respondent, Morrison Entity, filed its motion to convert case from Chapter 11 to Chapter 7. On January 27, 1996, the Court ordered that the exclusivity period under 11 U.S.C. Section 1121 be extended as to petitioners until May 25, 1996.

On January 31, 1996, the hearings to consider the approval of the second amended disclosure statement, and the motion to convert, were ordered continued to March 6, 1996, at 2:30 P.M., in Courtroom 1475, and petitioners were ordered to file a third amended disclosure statement by February 23, 1996.

On February 23, 1996, petitioners filed their third amended disclosure statement and plan. A second appendix thereto was filed March 4, 1996.

On March 6, 1996, the Court ordered that the third amended disclosure statement be disapproved, and that the case be converted to one under Chapter 7. The Court further ordered

that the relief from the automatic stay previously granted in favor of respondent, Morrison Entity, be effective in order to allow it to continue with its nonjudicial foreclosure against petitioners' residence.

On March 11, 1996, petitioners filed their notice of appeal to the Bankruptcy Appellate Panel of the Ninth Circuit.

On March 11, 1996, petitioners applied to the United States Bankruptcy Court, Central District of California, for a temporary restraining order and order to show cause why the order of March 6, 1996 should not be stayed and why respondent, Morrison Entity, should not be enjoined from proceeding or continuing with the subject foreclosure. Hearing thereon was held on March 18, 1996, and appellant's application was denied.

On March 18, 1996, petitioners moved the United States Bankruptcy Appellate Panel of the Ninth Circuit for an emergency stay of the order of March 6, 1996, and to enjoin respondent, Morrison Entity, from proceeding or continuing with the subject foreclosure.

On March 19, 1996, said motion was denied, and on said date, the property located at 5248 Newcastle Lane, Calabasas, CA, was sold without notice pursuant to a nonjudicial foreclosure trustee's sale to respondent, Morrison Entity, for $25,000.00 consideration. On March 20, 1996, a

trustee's deed upon sale was recorded pursuant to said sale.

On March 26, 1996, two orders on motions for relief from the automatic stay were entered, granting relief from stay to movant, LFCU, and allowing foreclosure on the real properties located at 5603 W. Ave. L-4, Lancaster, CA, and 11453 Yolanda Ave, Northridge, CA.

On April 16, 1996, an order denying the motion of Bank of America for relief from the automatic stay was entered on the ground that an appeal had been filed by petitioners with the Bankruptcy Appellate Panel of the Ninth Circuit.

On May 7, 1996, an order on motion for relief from the automatic stay were entered, granting relief from stay to movant, Cal Fed, and allowing foreclosure on the real properties located at 11453 Yolanda Ave, Northridge, CA.

On June 20, 1996, an order of discharge was entered by the United States Bankruptcy Court for the Central District of California, in the chapter 7 case.

On July 7, 1996, petitioners' opening brief was filed with the Bankruptcy Appellate Panel of the Ninth Circuit.

By grant deed, dated July 11, 1996, respondent, Morrison Entity, conveyed the

property located at 5248 Newcastle Lane, to Martin C. Yacoobian Jr., Trustee of the MCY III Trust U/D/T, which was recorded in the Los Angeles Co. Recorder's Office on August 23, 1996. The sales price of the property was $825,000.00.

On July 23, 1996, respondent's, Morrison Entity's, opening brief was filed with the Bankruptcy Appellate Panel of the Ninth Circuit.

On August 28, 1996, petitioners' motion to waive oral argument, and to expedite appeal, and request for immediate submission date was filed with the Bankruptcy Appellate Panel of the Ninth Circuit.

On August 30, 1996 the Bankruptcy Appellate Panel of the Ninth Circuit issued an order, and took the motion to waive oral argument under submission.

On September 4, 1996, petitioners' filed its response to said order with the Bankruptcy Appellate Panel of the Ninth Circuit.

On September 12, 1996, respondent's, Morrison Entity's, filed its request for judicial notice and submission of relevant facts occurring subsequent to order from which appeal taken with the Bankruptcy Appellate Panel of the Ninth Circuit.

On September 19, 1996, petitioners' filed its response to respondent's submission of relevant

facts with the Bankruptcy Appellate Panel.

On March 18, 1997, an order of dismissal of petitioners' appeal was entered by the Bankruptcy Appellate Panel of the Ninth Circuit on ground of mootness.

On April 16, 1997, petitioners filed their notice of appeal to the United States Court of Appeals for the Ninth Circuit.

REASON FOR GRANTING THE PETITION

I. THERE IS A SUPREME COURT CASE REGARDING FAILURE TO OBTAIN STAY AND MOOTNESS ISSUE

In Butner vs. United States (1979) 440 U.S. 48, 55, the Supreme Court made clear that the substantive rights of parties in bankruptcy are "created and defined by state law." If such rights would survive the sale of property in state court, they should survive the sale in bankruptcy court as well, regardless of whether an appellant failed to comply with bankruptcy procedure requiring a stay of the sale itself. See id.; see also Douglas Baird, Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren, (1987) U.Chic.L.Rev. 815.

II. NINTH CIRCUIT COURT OF APPEALS DECISION AFFIRMING THE DISMISSAL OF THE APPEAL IS ERRONEOUS

A. CHANGING THE REQUESTED REVIEW.

The petitioners, in the opening brief to the Ninth Circuit Court of Appeals, requested that the Appellate Court must review the order of the Bankruptcy Appellate Panel of the Ninth Circuit under the "clear error standard." The Ninth Circuit Court of Appeals stated in their disposition, "Mootness is a jurisdictional issue which we review de novo." The Bankruptcy Appellate Panel found the appeals to be moot because no stay pending appeal was obtained and subsequent events prevent them from fashioning effective relief.

Had the Ninth Circuit of Appeals reviewed the appellate panel decision under the clear error standard, they would have probably agreed that appellate panel erred in their decision since the panel used fashioning effective relief as the reason for the mootness rather than the absolute ruling.

In In re Ounouli-Kona Land Co. (9th Cir. 1988) 846 F.2d 1170, the Ninth Circuit of Appeals stated that finality in bankruptcy has become the dominant rationale for their decisions. In the meantime, however, their past reliance on the rationale of a court's inability to fashion relief leaves an exception to bankruptcy's mootness rule. Since they first allowed this exception for cases in which a court is able to fashion relief, the exception has operated in only one situation "where real property is sold to a creditor who is a

party to the appeal." In re Sun Valley (1987) 823 F.2d 1373, 1375.

B. MOOTNESS RULE IN ONOULI CASE IS INAPPLICABLE.

The circumstances surrounding Onouli are distinguishable from the present situation as stated in the following summary.

In Onouli the state court ordered a foreclosure sale by public auction in 1983; purchaser's bid was the only bid. In 1984 debtor filed a petition in bankruptcy. In 1985 the state court confirmed the foreclosure sale to purchaser. The bankruptcy court then set aside the sale and ordered a new auction under its own supervision; debtor did not appeal the court's order. The second auction took place in September, 1985. Again purchaser bid was the only bid.

In March, 1986 the bankruptcy court confirmed the sale to purchaser; debtor appealed the bankruptcy court's confirmation order. Purchaser moved to dismiss the appeal as moot because debtor failed to obtain a stay of the sale pending appeal. The district court granted purchaser's motion.

In the Onouli case the sale was judicial, the debtor did not apply for a stay pending appeal, and Hawaii does not recognize a statutory right of redemption after a foreclosure sale.

California law recognizes a statutory right of redemption, and permits a sale to be set aside where the sale of the property involves any irregularity or unfairness, and further allows a sale to be set aside where a third party does not purchase the property in good faith.

C. DECISION ON INABILITY TO SET ASIDE THE SALE IS ERRONEOUS.

1. IRREGULARITIES IN FORECLOSURE SALE.

Relief from the automatic stay with respect to respondent, Morrison Entity, the holder of the second trust deed on the Calabasas property, became effective on March 6, 1996. Pursuant to In re Tome (Bk. Ct. C.D. Cal 1990) 113 B.R. 131, the trustee conducting the foreclosure sale should have been required to republish notice of sale at least 20 days before the date set for sale of the property, and give notice to petitioners of said sale.

The trustee's sale herein took place on March 19, 1996, prior to expiration of the 20 days notice required. Furthermore, it does not appear that the trustee either republished the notice of sale or gave notice to petitioners of said sale.

In essence, respondent Morrison Entity purchased a million dollar property at the

trustee's sale for $25,000, subject to the first trust deed held by respondent Bank of America.

In re Tome, supra, states,

"Once relief from stay has been granted, secured creditors have traditionally assumed that they may proceed with foreclosure under state law, uninhibited by any further limitations of bankruptcy law. The bankruptcy statute and rules are silent on this subject. The Court finds that this assumption is not warranted: a secured creditor may not foreclose on property of the estate without giving further notice beyond the minimum required by California law...

"The Ninth Circuit Bankruptcy Appellate Panel has stated in dictum that a secured creditor who forecloses under California law after obtaining relief from the automatic stay must at least republish the notice of sale. Ellis vs. Parr (In re Ellis) 60 B.R. 432 (9th Cir BAP 1985)...

"The Court holds that a secured creditor must at least republish its notice of sale and give notice to the owner, as required by Cal. Civ. Code Section 2924 et seq., before it may conduct a nonjudicial foreclosure sale of property of the estate. This decision accords with the dictum in Ellis, supra."

In In re Tome, the Court ordered the foreclosure sale set aside as invalid.

2. TAKING GROSS UNFAIR ADVANTAGE AND COLLUSION.

California law also will permit the sale to be set aside when a there is lack of good faith by the purchaser of the property. Lack of good faith has been defined as "fraud, collusion...or an attempt to take grossly unfair advantage of other bidders." In re Suchy (1985) 786 F.2d 900.

In addition to the irregularities in the procedure in conducting the trustee's sale by failing to republish notice of sale or to give new notice to petitioners, there was unfairness in the subsequent sale by respondent Morrison Entity to MCY III Trust.

In essence, respondent Morrison Entity purchased a million dollar property at the trustee's sale for $25,000, subject to the first trust deed held by Bank of America.

On August 6, 1996, Bank of America recorded a notice of default in the amount of $88,593.58 for nonpayment of installments on its first trust deed of approximately $889,650.

On August 23, 1996, respondent Morrison Entity sold the property to a third party, MCY III

Trust, for a price less than the first trust deed, by entering into an agreement with Bank of America that resulted in an unfair tax liability to petitioners in the amount of $90,623. Essentially, respondent Morrison Entity and Bank of America agreed to payoff the first trust deed for $750,000, and by so doing, shifted the Bank of America loss in principal amount on the first trust deed of $90,623 to petitioners as taxable income.

An addendum to the purchase agreement between respondent Morrison Entity and MCY III Trust, dated July 15 ,1996, regarding the continuing foreclosure proceedings by Bank of America should have alerted by buyer to the circumstances surrounding the sale. Although this knowledge does not constitute bad faith, it does alert the buyer to the risk involved with the sale. Also, it puts the buyer on notice that Bank of America, holder of the first trust deed, had commenced foreclosure proceedings on the property.

A letter, dated July 31, 1996, memorializing the agreement between Bank of America and respondent Morrison Entity is notable because it lists respondent Morrison Entity as the "borrower" and alerts it as to the tax consequences of the agreement.

A notice of default, recorded August 7, 1996, by Bank of America, states that no sale date may be set until three months from the date of said

notice was recorded. While Bank of America was entering into an agreement with respondent Morrison Entity regarding the payoff of its loan, and respondent Morrison
Entity alerting the buyer of the foreclosure by Bank of America, Bank of America records a notice of default which triggers the right of reinstatement for at least three months. Nevertheless, the sale went through and the escrow closed on August 23, 1996.

A release executed by respondent Morrison Entity in favor of Bank of America, dated August 8, 1996, released and discharged Bank of America from any claims, damages, or actions arising from the original loan in the amount of $889,650. Again, the release is treating respondent Morrison Entity as the debtor regarding the original loan.

A Form 1099C was issued by Bank of America to the appellant in the amount of $90,623, as forgiveness of principal debt owing to it, however, the escrow closing statement shows that respondent Morrison Entity received approximately $64,000 from the sale, which sum could have been applied to the principal amount owing to Bank of America.

3. SUMMARY.

The petitioners had demonstrated that the sale can be set aside. The petitioners provided all the documentation in the request for judicial notice to

the Ninth Circuit Court of Appeals to prove the stated facts. The Court has the equity power to order explicit finding of facts to set aside the sale. The Ninth Circuit decision on inability to set aside the sale is erroneous.

III. THERE IS A CONFLICT BETWEEN CIRCUIT COURTS OF APPEALS REGARDING THE ISSUE OF PURCHASE IN BAD FAITH

The Third, Seventh and Tenth Circuits have looked to "value" in determining "good faith". Cumberland Farms Dairy, Inc. v. National Farmers' Org., Inc. (In re Abbotts Dairies of Pennsylvania, Inc.) (3rd Cir. 1986) 788 F.2d 143, In re Rock Indus. Mach. Corp. (7th Cir 1978) 572 F.2d 1195, In re Bel Air Assocs. (10th Cir. 1983) 706 F.2d 301.

In addition, the Third Circuit required that there be a explicit finding of good faith by the bankruptcy Court. In re Abbots Dairies of Pennsylvania, Inc., supra.

The Ninth Circuit has held, however, that "good faith" does not depend on value and does not require the bankruptcy court to make an explicit finding of good faith. In re Onouli-Kona Land Co., supra.

This case presents an opportunity for the

Court to resolve the conflict between the Ninth Circuit Court of Appeals and the Third, Seventh and Tenth Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Counsel for Petitioners

APPENDIX

MEMORANDUM OF NINTH CIRCUIT COURT OF APPEALS.....1

ORDER OF DISMISSAL OF BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT.....5

ORDER CONVERTING CASE TO CHAPTER 7.....7

In re: HUSSEIN YOUSSEF; ZEINAB YOUSSEF,

Debtors,

HUSSEIN YOUSSEF; ZEINAB YOUSSEF,

Appellants,

v.

MORRISON ENTITY; THE BANK OF AMERICA; CAL FED SAVINGS; LFCU; BANKCARD SERVICES,

Appellees.

No. 97-55559

Memorandum[1]

United States Court of Appeals
Ninth Circuit

October 27, 1997

Appeal from the Ninth Circuit Bankruptcy Appellate Panel Robert C. Jones, Alfred C. Hagan, and Sidney

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

C. Volinn, Judges Presiding

Submitted October 20, 1997[2]

Before: THOMPSON, T.G. NELSON, and KLEINFELD, Circuit Judges.

Debtors Hussein and Zeinab Youssef appeal the order of the Bankruptcy Appellate Panel ("BAP") dismissing as moot their appeal from the bankruptcy court's order which converted the Youssefs' Chapter 11 bankruptcy to a Chapter 7 bankruptcy and allowed creditor Morrison Entity relief from the automatic stay in order to foreclose on the Youssefs' residence. We have jurisdiction pursuant to 28 U.S.C. Section 158(d), and we affirm. "Mootness is a jurisdictional issue which we review de novo." Arnold & Baker Farms v. United States (In re Arnold & Baker Farms), 85 F.3d 1415, 1419 (9th Cir. 1996), cert. denied, 117 S. Ct. 681 (1997).

First, the Youssefs' contention that 11 U.S.C. Section 363(m) limits the mootness rule to appeals from sales by a bankruptcy trustee lacks merit. See Onouli-Kona Land Co. v. Estate of Richards (In re Onouli-Kona Land Co.) 846 F.2d 1170, 1172

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[2] The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

(9th Cir. 1988).

Second, the Youssefs contend that their appeal was not moot because California's law requiring Morrison to republish the notice of sale after termination of the automatic stay permits the transaction to be set aside. We disagree.

Generally, when a debtor appeals a bankruptcy court's order lifting the automatic stay to permit the sale of the debtor's assets, the debtor's failure to obtain a stay pending appeal renders the appeal moot. See In re Onouli-Kona Land Co., 846 F.2d at 1171.
The mootness rule does not apply where state law would otherwise permit the transaction to be set aside. See Mann v. Alexander Dawson Inc. (In re Mann), 907 F.2d 923, 926 (9th Cir. 1990). California law does not require further notice when a continued sale follows a termination of the automatic stay. See Cal. Civ. Code Section 2924g(d) (West 1997); Abdallah v. United Sav. Bank, 51 Cal.Rptr.2d
286, 292 (Cal. Ct. App. 1996), cert denied, 117 S. Ct. 746 (1997).

Here, because Youssefs failed to obtain a stay pending appeal, see In re Onouli-Kona Land Co., 846 F.2d at 1171, and because California law does not otherwise permit the transaction to be set aside, see In re Mann, 907 F.2d at 926; Cal. Civ.

Code Section 2924g(d), their appeal is moot.

Third, the Youssefs' contention that their appeal was not moot because Morrison did not purchase the property in good faith lacks merit because the Youssefs have not demonstrated any fraudulent behavior or an attempt to take an unfair advantage. See Community Thrift & Loan v. Suchy (In re Suchy), 786 F.2d 900, 902 (9th Cir. 1986).

Accordingly, we affirm the BAP's dismissal of the Youssefs' appeal as moot. See In re Arnold & Baker Farms, 85 F.3d at 1419.

AFFIRMED.[1]

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[1] Appellants' request for judicial notice is denied.

In re: HUSSEIN YOUSSEF; ZEINAB YOUSSEF,

Debtors,

HUSSEIN YOUSSEF; ZEINAB YOUSSEF,

Appellants,

v.

MORRISON ENTITY; BANK OF AMERICA, et al.,

Appellees.

No. CC-96-1262-JHV

Order of Dismissal

United States Bankruptcy Appellate Panel
Ninth Circuit

March 18, 1997

Before: JONES, HAGAN AND VOLINN, Bankruptcy Judges

The panel has reviewed the parties' briefs and the appellate record. This is an appeal from an order converting the debtors' case to a chapter 7

and granting relief from the automatic stay. The panel finds this appeal to be moot, as no stay pending appeal was obtained and subsequent events prevent us from fashioning effective relief. Therefore, this appeal is ORDERED DISMISSED.

A certified copy of this order sent to the Bankruptcy Court shall constitute the mandate of the Panel.

In re: HUSSEIN YOUSSEF; ZEINAB YOUSSEF,

Debtors.

No. SV95-16623-AG

Order Converting Case to Chapter 7

United States Bankruptcy Court
Central District of California

March 6, 1996

The continued motion of secured creditor Morrison Entity to convert this case to one under Chapter 7 was heard on March 6, 1996 at 2:30 p.m., the Honorable Arthur M. Greenwald presiding. At the same time and place, a hearing on the debtors' Third Amended Disclosure Statement and Plan also took place. After considering the papers and arguments submitted by the parties, and good cause appearing therefor,

IT IS HEREBY ORDERED that the debtors' Third Amended Disclosure Statement is disapproved. It is further ordered that the motion of secured creditor Morrison Entity to convert this case to one under Chapter 7 is granted and the

case is converted to one under Chapter 7 forthwith. In accordance with the previous Order of this court signed and filed on January 30, 1996, and entered on January 31, 1996, relief from the automatic stay previously granted in favor of Morrison Entity is now effective and Morrison Entity may foreclose on the real property described in said Order and proceed with post-foreclosure remedies in accordance with applicable law.

Dated: March 6, 1996 "/s/Arthur M. Greenwald"
United States
Bankruptcy Judge